TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 372.

HENRY O. HOUGHTON, TRUSTEE, GEORGE E. MITCHELL, J. MURRAY KAY, ET AL., APPELLANTS,

vs.

HENRY C. PAYNE, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1909.

(19,023.)

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In the Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee, *et al.*
} No. 1303.

a Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Complainants,
vs.
HENRY C. PAYNE, Postmaster General.
} No. 23342. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint.*

Filed May 31, 1902.

Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton
vs.
HENRY C. PAYNE, Postmaster General.
} In Equity. 23342.

To the honorable the supreme court of the District of Columbia, sitting in equity:

Henry O. Houghton, trustee, of Cambridge, George H. Mifflin, of Boston, J. Murray Kay, of Brookline, and said Henry O. Houghton, all in the State of Massachusetts, Lucy H. Valentine, of New York in the State of New York, Oscar R. Houghton, of Riverside in the State of Connecticut, and Albert F. Houghton, of said New York,

copartners doing business under the firm and style of Houghton, Mifflin and Company, bring this their bill of complaint against Henry C. Payne, Postmaster General of the United States.

And your orators complaining say:

1. That your orators are each citizens of the United States:

That the respondent is a citizen of the United States holding the office of Postmaster General of the United States.

2. That heretofore and on the seventeenth day of March, 1886, your orators were and ever since have been engaged in the
2 business of printers and publishers of books and periodicals of the Riverside Press in said Cambridge, having their office of publication at four Park street in said Boston, and that said office of publication was and is well known.

3. That as such publishers they are now and since said seventeenth day of March 1886, have been engaged in printing and publishing a series of periodical publications known and described as "Riverside Literature Series."

That these publications, each and every of them, since said seventeenth of March 1886, to the filing of this bill, have been regularly issued at stated intervals as frequently as four times a year, have borne date of issue, have been numbered consecutively, and have been issued from the known office of publication of your orators hereinbefore set forth;

That these publications, each and every of them, have been formed of printed paper sheets, without boards, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications;

That these publications, each and every of them, have been devoted to literature, have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates, and your orators in the publication and issue of these publications have complied with all the terms conditions and requirements of the laws of the United States relating to mailable matter of the second class;
3 and your orators file herewith copies of said publications which, in respect to the requirements of mailable matter of the second class, are similar to each and every other of said publications.

4. That of these publications already issued Nos. 1–18 were issued weekly to July, 1886, Nos. 19–42 monthly to April, 1889, Nos. 43–62 quarterly to April, 1894, Nos. 63–116 semi-monthly to May, 1897, Nos. 117–143 monthly to May, 1900, Nos. 144–151 quarterly to April, 1902. That from said March 17, 1886, to the filing of this bill these publications have been recognized, entered and admitted by the successive Postmaster Generals of the United States as mailable matter of the second class, and have been conveyed in and by the mails of the United States at the rates prescribed for mailable matter of the second class, the last certification thereof being upon the change to a quarterly issue in the year 1900, and being as follows:—

3505.

Certificate of Entry of Publication as Second Class Matter.

POST OFFICE AT BOSTON, *Sept.* 15, 1900.

I hereby certify that the Riverside Literature Series, a quarterly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged, or until revoked.

GEORGE A. HIBBARD, *Postmaster*,
By C. C. MANSFIELD, *Ass't P. M.*

4 And your orators further allege that the entry and admission of these publications as mailable matter of the second class was not made upon false evidence, and that since their first admission in March, 1886 until the filing of this bill there has been no change in their character except as to interval of issue as hereinbefore set forth.

5. That on April 4, 1902 the following notice was received by your orators:

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *April* 4, 1902.

Messrs. Houghton, Mifflin & Co., pub. of "Riverside Literature Series," 4 Park St., Boston, Mass.

GENTLEMEN: You are respectfully informed that I am directed by the Third Assistant Postmaster General to inform you that opportunity is given you to show cause why your publication (the Riverside Literature Series) should not be denied second class rates of postage under the provisions of section 276, Postal Laws and Regulations, (a copy of which is enclosed), on the ground that your publication has the characteristics of books.

The department informs me that the hearing may take place at this office or at the department at Washington,—preferably at this office. All arguments, statements and evidence submitted by
5 you must be in writing, and this office is instructed that all arguments, evidence etc., must be submitted to the department by April 22.

If you desire to be heard at the department at Washington you will have to make an appointment with the Third Assistant Postmaster General.

Respectfully, GEO. A. HIBBARD, *Postmaster.*

(Copy enclosed.)

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *July* 17, 1901.

Order No. 898.

Section 276, Postal Laws and Regulations, edition of 1893, is hereby amended to read as follows:

SEC. 276. General definition.—Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in section- 12 and 14. (Act of March 3, 1879, sec. 10, 20 Stats., 359) The sections referred to are 293 and 277. Second class matter above described is of two kinds: (1) That sent by publishers or news agents. (Section 299) (2) That sent by others than publishers or news agents. (Section 302). "Periodical publications" herein referred to are held not to include thos having the characteristics of books, but only such as consist of current news or miscellaneous literary matter, or both (not excluding advertising), and conform to the statutory characteristics of second class matter.

CH. EMORY SMITH,
Postmaster General.

6 6. That evidence and argument that these publications should not be denied second class rates on account of their having characteristics of books were submitted in compliance with said notice.

That on May 5th, 1902, the following notice was received.

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 5, 1902.

Houghton, Mifflin — Company, 4 Park St., Boston, Mass.

GENTLEMEN: In relation to your publication, the Riverside Literature Series, for which you were requested to submit evidence and arguments to show why it should not be denied second-class rates on account of its having characteristics of books, I have to inform you that your evidence was submitted to the Third Assistant Postmaster General as requested by his letter of April 2nd, and in answer thereto I have received notice to inform you that your certificate of entry giving you permission to mail the Riverside Literature Series at second-class rates is cancelled. You are further notified that hereafter it will be unlawful to print in the Riverside Literature Series a statement of entry, and that when it is offered for mailing in the future, whether by you, news agents or others, postage
7 will have to be prepaid thereon at the third-class rates by affixing stamps thereto.

Respectfully, GEO. A. HIBBARD, *Postmaster.*

P. S.—The reason for exclusion is, failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance in the mails as second-class matter.

That on May 8th, 1902, the foregoing order was suspended by order of the Postmaster General until further notice.

That on May 22nd, 1902, the following notice was received by your orators:—

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 22, 1902.

Houghton, Mifflin & Company, 4 Park street, Boston, Mass.

GENTLEMEN: In the relation to your request of May 21st asking for extension of time for the Riverside Literature Series, I have to inform you that under permission granted by the Third Assistant Postmaster General, that you will have until May 31st to mail your publication in, and the date of exclusion will be May 31st.

Respectfully,
(Signed) GEO. A. HIBBARD, *Postmaster.*

8 And your orators, on information and belief, declare:

That on May 31st, 1902, these publications will be excluded from the mails, in accordance with the foregoing orders of the Postmaster General.

7. That the cancellation of the certificate of entry giving permission to mail such publications at second class rates on account of their having the characteristics of books as declared by the respondent was unlawful.

That the exclusion of these publications from the mail as mailable matter of the second class, if put in force on May 31, 1902, as now threatened, will cause your orators great pecuniary loss and damage, both in the advanced rates demanded and in the necessary reorganization of its business in distributing these publications of which during the past year upwards of five hundred thousand copies were sent through the mails, all of which increase in rates and charges will have to be borne by your orators in those cases where existing contracts require it.

8. That your orators are liable, under existing contracts, to supply upwards of two million copies of these publications at a price based upon the postage rates chargeable upon them as mailable matter of the second class.

9. That the action of the Postmaster General in excluding these publications from the mails and denying to them the privilege of mailable matter of the second class, as hereinbefore set forth, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office in regard to these particular publications extending over an unbroken period of sixteen years.

9 That the right to have these publications carried in the mails as mailable matter of the second class, and which has been accorded to your orators by the action of the Postmaster Generals, is a valuable property right exceeding in value the sum of five thousand dollars.

For as much as your orators are without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your orators pray:

First. That your orators may be declared to be entitled to have these publications entered, received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

Second. That it may please the court to grant an injunction restraining the respondent from enforcing the cancellation of the certificate of entry set forth in paragraph six of this bill, and requiring him to receive said publications and transmit the same through the mail as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879.

Third. For such other and further relief as, under the facts stated, your orators may be entitled and in equity may seem meet.

Fourth. And your orators pray also for a preliminary injunction, and that your honors will grant a writ of subpœna directed to said respondent, requiring him to answer this bill, but not under
10 oath, an answer under oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

GEORGE H. MIFFLIN,
HENRY O. HOUGHTON, *Trustee*,
J. MURRAY KAY,
LUCY H. VALENTINE,
OSCAR R. HOUGHTON,
ALBERT F. HOUGHTON,
By HOLMES CONRAD AND
LEIGH ROBINSON, *Their Sol'rs.*

UNITED STATES OF AMERICA, }
State of Massachusetts. }

BOSTON, *May* 27, 1902.

On this twenty seventh day of May, 1902, personally appeared George H. Mifflin who being by me duly sworn, deposes and says that he is one of the complainants within named; that he has read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

Sworn to and subscribed before me this twenty seventh day of May, 1902.

JOHN ABBOTT,
[SEAL.] *Notary Public.*

11 COMMONWEALTH OF MASSACHUSETTS, }
Office of the Secretary. }

BOSTON, *May* 27, 1902.

I hereby certify, that at the date of the attestation hereto annexed John Abbott was a notary public, for the said Commonwealth, duly commissioned and constituted, that as such notary public, he was

by law authorized to administer oaths and take acknowledgments of deeds and other instruments throughout the Commonwealth; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; and that I believe the signature to the annexed attestation to be genuine.

In testimony of which, I have hereunto affixed the seal of the Commonwealth the date first above written.

[SEAL.] WM. M. OLIN,
Secretary of the Commonwealth.

12 *Restraining Order.*

Upon the complainant filing undertaking as required by equity rule 42, the defendant will be hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 16th day of June at 10 o'clock a. m. 1902, of which take notice.

By the court:

A. B. HAGNER, *Justice.*

Attest:
J. R. YOUNG, *Clerk, etc.,*
By R. J. MEIGS, JR.,
Ass't Clerk, etc.

13 *Answer of Defendant.*

Filed October 15, 1902.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Ray, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Complainants,
vs.
HENRY C. PAYNE, Postmaster General, Defendant.
} Equity. No. 23342.

Answer of the defendant, The Postmaster General, to the bill of complaint of the above-named complainants.

The defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering says:

I–II. The defendant is informed and believes that the allegations of the first two paragraphs of said bill are true.

III. For answer to the third paragraph, the defendant says that

the publications of the complainants designated as the "River-
14 side Literature Series" do not constitute a periodical publication within the intent and meaning of the statute of the United States defining the various classes of mailable matter. On the contrary, the defendant avers that although said publications are regularly issued at stated intervals from the known office of the complainants, and are formed of printed paper sheets, without board, cloth, leather or other substantial binding, and, as in said paragraph set forth, thus comply with the external characteristics and conditions of the second class of mail matter, nevertheless *internally and in substance*, they have not the characteristics of said second class of mail matter, but have the characteristics of books, and are in fact books, which by law are included in the third class of mail matter; and further, that said publications have not the characteristics of said second class of mail matter, in that they have no true relation or connection one with another so as to constitute them a periodical within the intent of the law, but each publication, issue, or so-called number, is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book; and defendant further avers that the complainants have been in the practise, whenever the reprint was of greater volume than usual, of calling such a publication a double, triple, quadruple or quintuple number, as the magnitude of the publication might require, and of charging therefor twice, thrice, four or five times the usual price, as the case might be.

15 And the defendant further avers that the said several reprints follow one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history and mythology; and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint are printed the words "Riverside Literature Series," and that the said reprints are numbered successively; and the defendant further avers that the complainants have been in the practice of printing, under the said style of the "Riverside Literature Series," so-called extra numbers designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers or issues which are numbered successively; all of which will appear by an examination of the copies of such publications filed with the said bill and with this answer as a part hereof (marked Exhibits A, B, C, D, E and F), as well as by an inspection of the titles of the different numbers as the same are printed upon the cover of each of said copies.

And in further denial of the allegation that said several reprints published under the style of the "Riverside Literature Series" constitute a periodical publication within the meaning of the act of March 3, 1879, the defendant says that the said reprints are sold by

the complainants as separate publications, complete in themselves, and are designed, and used, as text-books for the study
16 of literature, and the same are likewise sold at a reduced rate for 10 or more copies of the same publication, and also at a further reduced rate of 100 or more copies of the same publication, and the same publication- bound in linen covers, without other or further change, are confessedly sold as books; all of which facts will more at large appear by reference to the printed announcement, catalogue or advertisement of said series issued by the complainants and annexed to this answer marked Exhibits G and H, and prayed to be read as a part hereof.

IV. The defendant is informed and believes that the allegations of the fourth paragraph are true.

V. The defendant admits the allegations of the fifth paragraph.

VI. The defendant admits the allegations of the sixth paragraph, with the exception of the allegation that in accordance with the orders therein mentioned the said publications will be excluded from the mails, and this he denies; he avers on the contrary the only effect of such orders will be to require the payment of postage at the third class rate instead of the second class rate, and he further says that it was his duty to examine into all the facts and circumstances which determine whether or not such publications do now in fact comply with the statutory conditions for acceptance at said second-class rate; and that, as a result of the inquiry into the facts and circumstances, upon the hearing aforesaid, this defendant, acting through the Third Assistant Postmaster General has found said publication not to be entitled to admission to the mails at the
17 second-class rate; and that it is his intention, in pursuance of such finding, unless restrained by this court, hereafter not to admit said publications to the mails at such second class rate.

VII. Answering the seventh paragraph as well as answering generally to the whole bill, the defendant says that, as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service. That among his duties is that of classifying the mail matter offered for transmission through the United States mail and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him to investigate and ascertain whether matter transmitted as second class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second-class rate, that such investigation, exercised by this defendant as the head of an executive department in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and an interpretation of law; and that in the case of the publication hereinbefore mentioned, after notice to the complainants, a full, fair and impartial hearing, and an inquiry into the facts relevant and material to the inquiry, an examination of evidence and a

construction of the law and application thereof to the facts, the
18 defendant found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class matter but on the contrary the characteristics of third-class matter, and not fulfilling the conditions established by law for second-class matter, were not entitled to admission to the mails at the second-class rate, and that the certificate permitting such admission should for that reason, be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant, and the Third Assistant Postmaster General acting in that behalf; and for that reason, as defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further says that said certificate of entry was not cancelled, nor were the said publications refused admission to the second-class rate, by reason of any matter, thing, principle, rule or statement contained in the amendment to section 276 issued on July 17, 1901; but upon the sole ground that the said publication, by reason of the characteristics hereinbefore set out in the third paragraph of this answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879; but the said publication, and each and every of them, is a distinct and separate publication, complete in itself, not forming an integral part, issue or number of a regular periodical, but each and every of them is within the intent and meaning of the terms "books, transient
newspapers and periodicals" as the same are employed in
19 said act to define and designate mailable matter of the third class; miscellaneous printed matter.

VIII. The defendant can neither admit nor deny the allegations of the eighth paragraph, and submits that the same are wholly irrelevant and immaterial; but for anything the defendant knows to the contrary the same may be true as stated.

IX. In answer to the ninth paragraph, the defendant admits that his action in excluding the said publications from the privilege of the second class rate is contrary to the practice of his predecessors who for sixteen years admitted similar publications under the same general name to the privilege of that rate; but the defendant further says that the admission and transmission of mailable matter under the terms prescribed by the statutes is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Postmaster General of mailable matter of a certain kind at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name at such particular rate.

Defendant is further advised, and so believing, avers, that the privilege of having publications, which comply with the conditions of second class matter as defined in the act of March 3, 1879, trans

mitted at the second class rate is not a property right; and
20 that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainants in and by their said bill and the matters and things set forth therein do not make or state such a case as would entitle them to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publications are not entitled to transmission at second-class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion; and defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof. And having fully answered, the defendant prays to be hence dismissed with his reasonable costs.

EDWIN C. MADDEN,
Acting Postmaster General.

ASHLEY M. GOULD,
HENRY H. GLASSIE,
Solicitors for the Defendant.

21 DISTRICT OF COLUMBIA, ss:

Edwin C. Madden, acting Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true save those stated upon information and belief, which he believes to be true.

EDWIN C. MADDEN,
Acting Postmaster General.

Subscribed and sworn to before me this 12th day of September, A. D. 1902.

THOS. E. ROACH,
Notary Public.

[SEAL.]

22 *Replication.*

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Equity. 23342.

The complainants hereby join issue upon the answer of the defendant and will hear the cause on bill and answer against the defendant.

HOLMES CONRAD,
Solicitor for the Complainants.

23 *Stipulation.*

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Eq. 23342.

It is hereby stipulated by and between the solicitors for the respective parties that reference may be made at any hearing of this cause to all or any of the issues of the complainant press published under the designation of the Riverside Literature Series:—and that the cause may be heard at this term.

HOLMES CONRAD,
Solicitor and Counsel for the Complainants.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitor- and Counsel for the Defendant.

24 *Decree.*

Filed March 10, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON and Others, Complainants,
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23342.

This cause coming on to be heard upon the bill and the exhibits filed therewith and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed,

1. That the complainants are entitled to have their publications entitled "Riverside Literature Series," received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

2. That the Postmaster General be, and he is hereby perpetually restrained from enforcing and continuing the cancellation of the certificate of entry set forth in paragraph six, of said bill, and from refusing to receive said publication and transmit the same through the mails, as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry and transmission through the mails of their publication, entitled "Riverside Literature Series," as mailable matter of the second class as defined by the act of Congress approved March 3, 1879.

25 3. That the complainants do recover of the defendant their costs incurred in this suit, and may have execution therefor according to law.

A. B. HAGNER,
Asso. Justice.

And the defendant in open court by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals which is hereby allowed.

A. B. HAGNER.

26 *Opinion of the Court.*

Filed March 16, 1903.

In the Supreme Court of the District of Columbia.

HENRY O. HOUGHTON, Trustee, *et al.*
vs.
HENRY C. PAYNE, Postmaster-General. } Equity. No. 23342.

Justice HAGNER:

By the act of March 3, 1879, (20 Stats., 358) Congress revised the then existing classification of mailable matter, and affixed specific rates of postage to the respective classes thereby established; which were thus described:

"SEC. 7. Mailable matter shall be divided into four classes:
First. Written matter;
Second. Periodical publications;
Third. Miscellaneous printed matter;
Fourth. Merchandise."

Matter of the second class was thus described:

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

SEC. 11. Publications of the second class (except as provided in section 25) shall be entitled to transmission through the mails at two cents a pound or fraction thereof."

27 "SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 12. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

28 And by the act of March 3, 1885 (23 Stats. 385), it was provided that second class matter (except as to that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17, declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, etc, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

The difference between these rates and those prescribed by the act of 1885 for second class postage is very great, and from that circumstance doubtless grew the difficulty which this suit was intended to settle.

Up to the year 1886 no postal regulations had been issued by the authorities restrictive of the construction which had been adopted and continuously followed by the Post Office Department as to the description of mailable matter entitled to be carried as "second class;" and although Congress in 1885 had reviewed and reduced the rate of that matter very greatly, it had abstained from all restriction of the character of matter that should enjoy the benefit of the reduced rate.

In this state of the law and the postal regulations, the complainants, book-sellers and publishers at Boston, commenced the issue of

publications which they called the "Riverside Literature Series." They applied for and received from the Boston post office from time to time the certificate in the form issued by the Postmaster
29 General then in office, declaring their publications entitled to admission into the mails as "second class matter;" and, in accordance with the instructions of the Government officials, a notice to that effect was printed on the outside of such publications. The last of these certificates bore date of the 15th of September, 1900.

On the 4th of April, 1902, nearly two years after this last certificate was issued, the complainants were notified by the postmaster at Boston to show cause why they should not be denied second class rates of postage, under sec. 276, Postal Laws and Regulations, dated the 17th of July, 1901, on the ground that their publication had the characteristics of books; and they were warned that on the 22nd of April all arguments, evidence, etc. bearing on the subject must be laid before the department. Evidence and arguments were accordingly submitted by the complainants to the Third Assistant Postmaster General, and on the 5th day of May, 1902, they were informed by the postmaster at Boston that their said certificate of entry was canceled, and that thereafter their publications should be prepaid as third-class matter. The reason given for the exclusion being "failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance as second class matter."

By a subsequent notification the complainants were informed that the time of exclusion of their publication was extended to the 31st of May, 1902. On this last day, the bill before the court was filed against the Postmaster General, which prayed the court to
30 declare: 1st. That the complainants are entitled to have their publications entered and transmitted through the mails as second class matter. 2nd. For an injunction to restrain the cancellation of the certificate of entry of September 15, 1900, by that official, and requiring him to receive and transmit their publications as mailable matter of the second class,—and for further relief.

The carefully prepared answer of the Postmaster General denies: First. That the Riverside Literature Series constitutes a periodical publication within the intent and meaning of the statute defining the classes of mailable matter; that, although complying *with the external characteristics and conditions of the second class of mail matter, nevertheless, internally and in substance they have not the characteristics of second class matter, but have the characteristics of books, and are in fact books;* and the answer proceeds at length to point out the various grounds of this discrimination.

He next insists that it is his official duty to arrange the mail matter into the classes created and designated by Congress; that, after notice to the complainants and a full and impartial hearing of evidence be found and determined, in the exercise of judgment and discretion, that the publications of the complainants were not entitled, under the conditions prescribed by law, to be admitted as

second class matter; and that such finding and determination are not subject to review by this court.

Admitting his action in excluding said publications from
31 the privileges of second class matter is contrary to the practice of his predecessors, who for sixteen years admitted similar publications to the privileges of that rate, the Postmaster General insists that the admission and transmission of mailable matter under the terms prescribed by the statute is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no way bound or controlled by the action of his predecessors.

And finally, that the admission of mail matter at a certain rate constitutes no contractual obligation upon the United States or its officers, and that the privilege of having publications admitted at any particular rate is not a property right; and whether they do comply with the conditions and requisites for admission is a question wholly within the competence of the Postmaster General, and within the judgment and discretion of that official for the time being.

1. The question of the jurisdiction of this court to determine the case is first to be considered.

That this court possesses the general jurisdiction to award an injunction or a mandamus against the highest officers of the Government in a proper case cannot be denied. When Chief Justice Marshall in 1802 in Marbury *v.* Madison, 1 Cranch, 171, said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

32 he was but stating what was afterwards uttered by the highest court of England, in Ellis *vs.* The Lords of the Treasury, 6 Simons, 214, where the vice chancellor issued an injunction, enjoining those officials from paying money to an official of the exchequer.

In 25 Maryland, Magruder *vs.* Swann, governor, the court of appeals ordered a mandamus against the governor.

In the argument in U. S. *vs.* Kendall, Postmaster General, Attorney General Butler admitted that the President himself was amendable to a mandamus to require the performance of a ministerial duty.

I have no idea that under our law, an order of the Postmaster General excluding a class of publications from certain privileges of the mail service because, according to his construction of a statute they are not entitled to those privileges, is to be regarded as the exercise of such official discretion as prevents the examination by this court of the question whether that official's construction of the law is the correct one.

The decisions of the most recent Postmaster General can be no more impeccable or free from criticism than those of his predecessors, for he can have no more official authority than his predecessors. Indeed, as between variant decisions on the same subject, by persons holding the same office in succession, there should be rather an inclination by the courts to sustain the earlier judgment, especially

where it has been followed for a considerable time by successive officials; as was suggested in Decatur *vs.* Spaulding, 12
33 Peters; Warder *vs.* Chandler, Secretary of the Navy, 2 Mackey, 527.

In U. S. *vs.* Alabama Railroad, 142 U. S. 621, it appeared the act of Congress of 1876, ch. 179, sec. 13, declared that where a railroad built by Government aid claimed compensation for carrying the mails, it should receive but 80 per cent. of the usual rates. In the same year 1876, in which this law was passed, it was decided by the Postmaster General then in office, that if part of a railroad had been constructed without any such Government aid, it had the right to demand the full rates over the portion thus built by private subscriptions; and payment according to this decision had been followed by six different Postmasters General from 1876 to 1885. In the latter year, the Postmaster General then in office, reviewing the act of 1876, reversed the construction given to it by his predecessors, and reduced the allowance over that part of the road which had not been constructed from the land grants. It appears in the decision that this construction was given not on account of any mistake of fact in the original orders under which payment had been made, but upon the ground of a supposed error of law in the interpretation of the section involved. The Supreme Court reversed this decision, and speaking by Mr. Justice Brown said:

"We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years, through six different administrations of that depart-
34 ment—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be decisive in this suit. It is a settled doctrine of this court, that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction, may be prejudiced."

And the court overruled the decision of the last Postmaster General and reinstated that of his predecessor made nine years before.

Applying the suggestion made in this case to the case before us, it appears that between the passage of the act of March 3, 1879 and the cancelation of the last certificate in 1903, twenty-three years had intervened, during which eleven administrations of the Post Office Department had in turn been charged with the construction of the act; and during sixteen years of this period the complainants had been acting under the rule prescribed contemporaneously with the passage of the law; that Congress at twenty-three sessions had in turn examined the affairs of the postal service, at some of which sessions there had been made various changes connected with the matter in hand. During this time repeated suggestions had been made by different Postmasters General to amend the law so as to exclude

the class of mail matter here in controversy from the second
35 class rates; and this upon the earnest representations that the unwise liberality existing was responsible for the deficit in the post office revenues; and these recommendations had been examined by successive committees of both Houses, which had supported them in voluminous reports; with the result that Congress refused to make the changes so recommended; and so this contemporaneous construction remained undisturbed until the action taken in 1902, which is now under consideration.

There is no special power given to the Postmaster General to prescribe regulations at variance with an act of Congress. Section 161 of the Revised Statutes has been referred to as having some bearing upon the point, but this applies equally to all heads of departments. It is in these words:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the costody, use and preservation of the records, papers and property appertaining to it."

But this section specially provides that such regulations are not to be *inconsistent with law;* and the matters which may be embraced in the regulations thus authorized to be made are very different in character from those under examination.

There are several provisions of the Revised Statutes committing particular powers to the Postmaster General which are of
36 such comparatively unimportant character as to indicate that special care had been observed to limit that officer even in affairs of minor importance. Thus, by sec. 3907 Congress took the pains to empower him to provide by regulation for carrying small newspapers issued less frequently than once a week; and under sec. 3909 to prescribe by regulation as to the form of affidavit to be taken by the publishers of a newspaper.

In comparison with the large powers now claimed of interpolating into the act of 1879 limitations and conditions not set forth in it, these minor grants of power appear very insignificant. It is strange it should have been thought important to provide specially for such trivialities, if the great powers claimed as to the matter in hand were already appurtenant to the office. Indeed, it may be asked why the entire subject of postage rates and arranging the classification should not have been left bodily to the Postmaster General, if the general power now claimed was clearly given by the law.

In the case of U. S. *vs.* Kendall, 3 Cranch, C. C. R., Mr. Kendall's claim as Postmaster General of power inherent in the office which justified him to construe an act of Congress so as to refuse to enter a credit on the books to Stockton & Stokes directed by law, received no support from the courts, and he was peremptorily ordered to comply with the provisions of the statute, his own opinion of the justice of the credit to the contrary. As Mr. Kendall's contention was based upon a supposed error of law in construing the statute in

favor of the claimant in that case, the court, upon the prin-
37 ciple declared in U. S. *vs.* Alabama Railroad, above cited, exercised the power of examining into the propriety of his decision.

Its right to do so has been recently declared in the case of The American School of Magnetic Healing *vs.* McAnnulty, to appear in 187 U. S. 94. In that case the Postmaster General decided that the Magnetic Company was within the meaning of sec. 3929 R. S., which authorized him, upon satisfactory evidence that any person was engaged in conducting any fraudulent lottery or any other scheme or device for obtaining money by false pretences, to instruct postmasters to return to the sender all registered letters directed to such person, with the word "Fraudulent" stamped on the outside, and otherwise to refuse to assist in the circulation of letters for such person. The Postmaster General issued such an order to McAnnulty, the postmaster at the town of Nevada, Missouri. The supreme court held that the fact that the decision of that official upon which his order was based was made only after summons and hearing (as has been allowed in the controversy at bar) did not affect the case.

In reply to the inquiry whether Congress has entrusted the administration of such statutes wholly to the discretion of the Postmaster General to such an extent that his determination is to be held conclusive upon all questions arising under them, the court said, that although the conduct of the post office is a part of the administrative department of the Government, "that does not neces-
sarily and always oust the courts of jurisdiction to grant re-
38 lief to a party aggrieved by any action by the head or one of the subordinate officials of the department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

The court, after examining the entire case, held that upon the admissions of the demurrer the decision of the Postmaster General was not authorized by the statute, and his order "being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant. * * * In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

The court concludes that "simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have power to grant relief against, we are constrained to

* * * grant the temporary injunction as applied for by complainants."

In recognition of this decision the District Court of Appeals
39 very recently affirmed the decree of Justice Bradley in the case of Postmaster General *vs.* The National Railway Publication Company, which held an order of that official denying the privileges of second class postage rates to a publication called "The Official Guide of the Railways, etc.," generally known as the Travellers' Official Guide, was erroneous. The able opinion of the Court of Appeals in that case clearly shows that the department erred in holding the publication there referred to was not entitled to be rated as second class matter upon the case presented by the record; and I regard it as conclusive of this branch of the case.

II. It being clear that this court has the power to inquire into the validity of the decision of the Postmaster General the question remaining for consideration is whether, under a proper construction of the act of 1879, the Riverside Literature Series is entitled to the benefit of the second class rates.

The Postmaster General in his answer, as we have seen, admits that although the publications "comply with the *external characteristics and conditions of second class matter, nevertheless internally and in substance* they have not the characteristics of second class mail matter, *but have the characteristics of books, and are in fact books.*"

The requirements expressed in the law to entitle the admission of mail matter to the privileges of second class rates are nine in number, and under the discrimination of the answer must, with one exception, be designated as "*external.*" They require (1) there should be a *periodical* issue (2) *stated intervals*, (3) as frequently as
40 four times a year; (4) they must bear the date of the issue; (5) be numbered consecutively; (6) be issued from a known office of publication; (7) formed of printed paper sheets, (8) without board, cloth, leather, or other *substantial binding*, such as distinguish printed books for preservation from periodical publications, and (9) must have a legitimate list of subscribers. The only requirement expressed in the law which can be termed "internal" is that contained in provision fourth of section 14, which requires these publications "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

It is, of course, beyond the power of the Postmaster General by direct order to add another to the list either of *external* or *internal* requirements. Congress, of course, might have done this, either originally when it passed the law or at any time after its passage, since it possesses full powers of legislation in that direction. But this it has steadily refused to do. By such legislation it might have doubled or multiplied in still larger ratio the postage rates on publications precisely like that before us; or still further reduced it. But no branch of this Government except the legislature possesses such powers; and yet that is precisely what the Postmaster General would effectually accomplish by the new regulation of 1901, with

respect both to the external and to the internal requirements, if it were sustained. For example, the third division of section 14 is the only paragraph which refers to "books" in connection
41 with the requirements of second class matter, and all it there enjoins is that the periodicals of that class must not have *substantial bindings* "such as distinguish printed *books for preservation* from periodical publications." The bindings of the publications therein described are not those of *all* books, but only of such books as are "*bound for preservation.*"

But the Postmaster General's order of July, 1901, excludes all publications "having the *characteristics of books*," without regard to whether they are books "*bound for preservation*" (which implies reasonable strong binding); or only for temporary use, in the flimsiest or most perishable manner; or not bound at all. There are other "characteristics of books" besides their bindings, and the monthly magazines, such as the Century and Scribners', admittedly second class matter, possess many "*characteristics*" of ordinary books, besides those of opera books, note books, bank books, etc., etc., which are never or very seldom bound. Thus the order makes this *external* requirement more rigid and narrow than the statute had done.

The original "*internal*" provision, embraced in the fourth division of section 14, as passed by Congress, contained no requirement that the periodical publications to be entitled to second class rates shall *only* include such as "*consist of current news or miscellaneous literary matter, or both.*" But the Postmaster General's order *superadds* this qualification to those which Congress had theretofore determined to be sufficient, and had so declared in the statute passed nearly a quarter of a century ago.

42 Of course, this provision must have been designed to *add new conditions* to the existing enumeration; otherwise, it is without meaning at all (which we cannot assume), and should not have been introduced to perplex and give needless trouble. Religious magazines, or publications specially for architects, physicians, lawyers, electricians, mathematicians, chess-players, dressmakers, etc., etc., must add "current news or miscellaneous literary matter," to their contents under peril of exclusion from the second class rates. The case of the Railroad Guide, decided by the Court of Appeals, is an unanswerable illustration of this point.

These changes I think the Postmaster General was without power to make, and his order, in these respects, as to the case before me, was the consequence of an inaccurate construction of the statute, and should, therefore, be declared illegal and void.

Much stress was laid in the able argument on behalf of the Postmaster General, upon the fact that one of the publications filed as an exhibit was the republication of one of Thackeray's novels. I should have supposed, before reading the entire statute, that the republication of old novels or books would not have been within the contemplation of the law-givers as favored publications, since there seemed to be nothing in such admission of reprints to favor native living authors. But I find nothing in the law to indicate

that such a purpose was in the mind of the legislators; for in the enumeration of third-class matter, paying eight times as much as second class mail, are included "proof sheets, corrected proof sheets,
and manuscript accompanying the same," which would seem
43 more like a discrimination against our living authors than an encouragement; and by section 15 "foreign newspapers and other *periodicals* of the same general character as *those* admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States."

But the insertion in newspapers and magazines of chapters of completed books, and the insertion in serial form of English and American writings is no novelty. Most of the famous novels of Dickens, Reads, etc., were published in our magazines and newspapers contemporaneously with their publication in England. The European newspapers and magazines, admitted to second class rates, as we have seen, especially those published in France, generally contain parts of books. One at least of the best known magazines here (Lippincott's) publishes in each number a completed work; and no objection could be made to its second class privileges for that reason.

I have examined this case with care, and can see no reason why the preliminary injunction already granted should not be made perpetual, and I shall so order.

A. B. HAGNER,
Asso. Justice.

44 *Stipulation.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
PAYNE, Postmaster-General. } Eq. No. 23342.

It is stipulated by and between counsel for the respective parties that the original exhibits filed on behalf of the complainants and the defendant may be certified with the transcript of the record in lieu of copies thereof; and that such exhibits in the Court of Appeals may be used at the hearing of the cause and examined by the court and the printing thereof dispensed with.

HOLMES CONRAD,
Solicitor for the Complainant.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendants.

45 *Directions for Record.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

HOUGHTON ET AL.
vs.
PAYNE, Postmaster-General. } Eq. No. 23342.

The clerk of the court in making up the record on appeal in this cause will include: (1) bill of complaint and rule to show cause; (2) answer of the defendants; (3) replication; (4) stipulation of counsel; (5) opinion of the court; (6) final decree; (7) stipulation as to printing of exhibits.

MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendant.

I consent.
HOLMES CONRAD,
Sol. for Compl't.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 45, inclusive, and the exhibits, marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," "Exhibit E," "Exhibit F," "Exhibit G" "R. L. S. Exhibit," and "R. L. S. Exhibit," transmitted herewith, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23342, in equity, wherein Henry O. Houghton, trustee, *et al.* are complainants, and Henry C. Payne, Postmaster General, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10 day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1303. Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee, *et al.* Court of Appeals, District of Columbia. Filed Apr. 14, 1903. Robert Willett, clerk.

TUESDAY, *May* 19*th*, *A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, } No. 1303.

and

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309.

The argument in the above entitled causes was commenced by Mr. H. H. Glassie attorney for the appellant, and was continued by Messrs. Wm. S. Hall and Holmes Conrad attorneys for the appellees, and was concluded by Mr. John G. Johnson attorney for the appellant.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton. } No. 1303.

(Mr. Justice Shepard delivered the opinion of the court.)

This is an appeal from a decree of the supreme court of the District, declaring that the complainants, under the partnership name of Houghton, Mifflin and Company, are entitled to have their publications, entitled Riverside Literature Series, received and transmitted through the mails as matter of the second class; and perpetually restraining the defendant, The Postmaster General, from enforcing and continuing the cancellation of the certificate of entry formerly issued to complainants, and from refusing to receive and transmit the said publication through the mails, as mailable matter of the second class.

The cause was submitted upon bill, answer and exhibits, and the final decree from which this appeal has been prosecuted, was entered March 10, 1903.

The bill alleges: That complainants, under the partnership name of Houghton, Mifflin and Company, were, on March 17, 1886, and have ever since been engaged in the business of printers and publishers of books and periodicals of the Riverside Press in Cambridge Massachusetts, having their office of publication at four, Park row, Boston, which said office was and is well known. That since said date they have been publishing a series of periodical publications known and described as "Riverside Literature Series," each of which

have been regularly issued at stated intervals, as frequently as four times a year, have borne date of issue, have been numbered consecutively, and have been issued from the known office of publication aforesaid. That each and every one of these publications have been formed of printed paper sheets, without boards, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications. That each and every one have been devoted to literature, have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, and in respect of publication and issue have complied with all the requirements of the laws relating to mailable matter of the second class.

That of these publications already issued, Nos. 1–18 were issued weekly to July 1886; Nos. 19–42, monthly to April 1889; Nos. 43–62, quarterly to April 1894; Nos. 63–116, semi-monthly to May 1897; Nos. 117–143 monthly to May 1900; Nos. 144–151, quarterly to April 1902. That from March 17, 1886, to the date of filing this bill, these publications have been recognized, entered and admitted by the successive Postmaster Generals of the United States as mailable matter of the second class, and have been conveyed at the rates for such matter prescribed under certificates to that effect, the last of which bears date September 15, 1900. (The certificate is attached, and is of the regular form of certificate adopted by the Post Office Department for second class mail privileges, concluding with these words—"Valid while the character of the publication remains unchanged, or until revoked.") That on April 4, 1902, complainants were served with notice to show cause why their publications aforesaid should not be denied second class rates of postage, on the ground that they have the characteristics of books, upon a hearing set for April 22.

That evidence and argument were submitted at the hearing given on the date aforesaid on behalf of the continuation of the said mailing privilege. That on May 5, complainants were served with notice in writing to the effect that the certificate of admission before mentioned had been cancelled, and that thereafter it would be unlawful to print the usual statement of entry as second class matter, and further that their publications when offered for mailing thereafter would have to be prepaid at third class rates. That subsequently the order of cancellation and denial of second class privilege was stayed until May 31. That this cancellation and refusal are unlawful, and the exclusion of the aforesaid publications will cause complainants great pecuniary loss and damage both in the advanced rates demanded, and in the necessary re-organization of their business for the distribution of the same, which during the past year amounted to about five hundred thousand copies.

That complainants are liable, under existing contracts, to supply upwards of two million copies of these publications at a price based upon the postage rates chargeable upon them as matter of the second class. That the action of the Postmaster General in exclud-

ing their publications is a reversal of an unbroken practice of sixteen years, and is the destruction of a property right exceeding five thousand dollars in value. And that complainants are without adequate remedy at law, because if any remedy could be afforded at law, it would necessitate a multiplicity of suits.

The answer of the Postmaster General, reserving exceptions to the authority of the court to review the exercise of discretion by him in the matter of investigating and determining the character of the complainants' publications and the rates of postage chargeable thereon, admits the formal allegations of the bill, but denies that the said Riverside Literature Series is a periodical publication within the meaning of the law, and avers that the several numbers of the same have all the characteristics of, and are books, and as such are not mailable at second class rates. The answer then proceeds to describe the character of the publication as follows:

"That said publications have not the characteristics of said second class of mail matter, in that they have no true relation or connection one with another so as to constitute them a periodical within the intent of the law, but each publication, issue, or so-called number, is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book; and defendant further avers that the complainants have been in the practice, whenever the reprint was of greater volume than usual, of calling such a publication a double, triple, quadruple or quintuple number, as the magnitude of the publication might require, and of charging therefor twice, thrice, four or five times the usual price, as the case might be.

And the defendant further avers that the said several reprints follow one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history and mythology; and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint are printed the words "Riverside Literature Series," and that the said reprints are numbered successively; and the defendant further avers that the complainants have been in the practice of printing, under the said style of the "Riverside Literature Series," so-called extra numbers designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers or issues which are numbered successively; all of which will appear by an examination of the copies of such publications filed with the said bill and with this answer as a part hereof (marked Exhibits A, B, C, D, E and F), as well as by an inspection of the titles of the different numbers as the same are printed upon the cover of each of said copies.

And in further denial of the allegation that said several reprints published under the style of the "Riverside Literature Series" constitute a periodical publication within the meaning of the act of March 3, 1879, the defendant says that the said reprints are sold by the

complainants as separate publications, complete in themselves, and are designed, and used, as text-books for the study of literature, and the same are likewise sold at a reduced rate for 10 or more copies of the same publication, and also at a further reduced rate of 100 or more copies of the same publication, and the same publication—bound in linen covers, without other or further change, are confessedly sold as books; all of which facts will more at large appear by reference to the printed announcement, catalogue or advertisement of said series issued by the complainants and annexed to this answer marked Exhibits G and H, and prayed to be read as a part hereof."

The answer further avers that the revocation of the certificate of admission to the mail was based, not upon any regulation of the department, but on the sole ground that the publication aforesaid was not admissible to the mails as matter of the second class, because it was not such as defined in the statute making classification of mail matter.

Among the exhibits are the following numbers of the Riverside Literature Series: 1. A complete republication of Henry Esmond with thick paper cover and linen back. Above the title with name of author and publishers appear the words Riverside Literature Series in large letters. Near the top of the cover appear the following: Issued monthly September to June. Number 140. (Quintuple number.) February 7, 1900. Near the bottom appear list of prices: Single numbers, fifteen cents: Double numbers thirty cents. Triple numbers forty five cents. Quadruple numbers fifty cents. Quintuple numbers sixty cents. 2. Three Outdoor Papers, by T. W. Higginson No. 141. 3. Sesame and Lilies by John Ruskin, No. 142. 4. Plutarch's Alexander the Great—done into English by Sir Thomas North—No. 143. 5. The Book of Legends, by Horace E. Scudder No. 144. All of these save in title, date and number bear the same imprint as Henry Esmond. Other exhibits consist of catalogues of the publishing company, giving titles, prices &c. Prefatory notes in these announce the purpose of the publishers "to issue in inexpensive form for school use the most interesting and instructive master pieces of the greatest writers of England and America," and also inform the public that while each number has been issued in paper covers, many single numbers, and many combinations of numbers have been bound in linin covers in response to a demand for a larger amount of material in a single volume with a more permanent binding. The price list gives the cost of the paper numbers, and also the bound volumes. Bound volumes sent at purchasers' cost; paper backs are post paid. Many other publications of this series, and by other publishers were by consent of parties exhibited on the hearing.

The sections of the postal laws which have bearing, direct or indirect, upon the subject matter of the controversy are the following:

"SEC. 7. Mailable matter shall be divided into four classes:

First. Written matter;

Second. Periodical publications;

Third. Miscellaneous printed matter;
Fourth. Merchandise."

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

SEC. 15. That foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States. * * *

SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty, and books which are admitted to the international mails exchanged under the provisions of the Universal Postal Union convention may, when subject to customs duty, be delivered to addresses in the United States under such regulations for

the collection of duties as may be agreed upon by the Secretary of the Treasury and the Postmaster-General.

Section 20, puts in the fourth class all matter not embraced in the first, second and third classes, with certain limitations upon its character, weight &c.

SEC. 25. That publications of the second class, one copy to each actual subscriber residing in the county where the same are printed, in whole or in part, and published, shall go free through the mails; but the same shall not be delivered at letter-carrier offices, or distributed by carriers, unless postage is paid thereon at the rate prescribed in section thirteen (6) of this act;

Provided, That the rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter-carrier office for delivery by its carriers, shall be uniform at one cent each.

1. The case at bar is distinguishable from that of Payne *v.* Nat. R'y Pub. Co. (20 App. D. C. 581), inasmuch as there is not only some difference in the facts relating to the respective publications, but also, and particularly, for the reason that the action of the Postmaster General in that case was based upon a regulation of his department, in excess of his authority because it made a substantial addition to the requirements of the statute.

Upon the practical admission, as apprehended by the court in that case, that the plaintiff had complied with the requirements of the statute itself, and had been denied the admission of its publication to the mails as matter of the second class, by virtue of the unauthorized regulation, it was held that the Postmaster General owed it the performance of a simple duty, plainly imposed by the act of Congress, that was enforceable through the writ of mandamus.

The same question touching the judicial power to supervise the determination of the head of the Post Office Department respecting the admission of publications to carriage in the mails at second class rates, has been raised and argued in the case at bar in application to the facts disclosed by the record.

And the general question of the extent, and limitations of this power is not affected by differences in the form of relief sought—whether mandamus in one case, or injunction in another. The difference of the operation of the two remedies in a particular case, as illustrated in Payne *v.* Bates and Guild Co.—*post*—would seem, however, to suggest, the exercise of greater circumspection where the remedy sought is injunction, which may have a continuing, mandatory operation.

With these suggestions we will pass the question and consider the case upon its merits, which have been fully and ably argued upon both sides, believing that, on account of litigation both pending and imminent, the public and private interests will be better served by so doing.

2. It appears that the publications of the Riverside Literature Series comply with the conditions of section 14 of the statute, in that

they are regularly issued from a known office of publication, at stated intervals, as frequently as four times a year, bear a date of issue, are numbered consecutively, and are formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. For the present purpose, it may be assumed that they are all originated for the dissemination of information of a useful character, or devoted to literature, and have a legitimate list of subscribers. The question then arises: Are these publications—Henry Esmond, Plutarch's Life of Alexander, and others—books, and therefore mailable matter of the third class as defined in section 17; or, as a result of their issue in consecutive numbers and parts of the Riverside Literature Series, do they constitute a periodical publication, and become mailable matter of the second class, as defined in sections 10 and 14?

We think that there is but one reasonable answer to this question, and that has been given by the Postmaster General.

Henry Esmond, when given to the world by the genius of Thackeray in 1852, and whether issued by the publisher in paper covers, or with board, cloth, leather, or other substantial binding, was a book in every sense of the word. Republished singly at any time since the enactment of the present postal law, and mailed, either bound or unbound, it has been, and is now, unquestionably, subject to postage as matter of the third class.

Does it become any the less a book when, there being no protecting copy-right, it may be republished *verbatim* under its original title, with the addition of a number of a named series consisting of books by other authors, numbered consecutively and issued at stated periods not less than four times a year?

Can the well known book lose its identity and become completely merged in a periodical publication through the adoption and imprint of these additions?

Surely Congress could have contemplated no such possibility when it undertook the complete classification of mail matter, putting books in one class and periodical publications in another.

It is a matter of common knowledge that when these statutes were enacted there were in existence many long established periodical publications, known generally as magazines and reviews, that had been regularly issued in consecutive numbers, at stated periods not less than four times a year, from well known offices of publication. These, whilst purchased and sold by book and news dealers, were, in great part, sent through the mails to individual subscribers throughout the country.

Conceiving that such of these as disseminated information of a public character, or were devoted to literature, the sciences, arts, or some special industry, and had legitimate lists of subscribers, were of educational value, and promotive of the public good, Congress undertook to encourage their circulation along with the ordinary newspapers of more frequent issue, by admitting them to carriage in the mails at an exceptionally low rate. Each of these had a sin-

gle, general name; consecutive numbers, alike in size, print, &c., were but parts of one continuous publication, having no sub-title, or other specific designation to distinguish them from each other. A publication of the kind is commonly called a periodical, and answers the definition of that word as given in the Century dictionary: "A publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics, and no one of which is contemplated as forming a book of itself."

In view of the general character of the periodical publications of the time, and the collocation of descriptive words in section 10,—"all newspapers and other periodical publications"—we think it reasonable to believe that the framers of the law regarded periodical publications, and periodicals as synonymous.

This inference seems reduced to certainty by the language of succeeding sections of the same statute. In section 15 we find that "foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States," shall be transmitted at the same rates as if published therein.

If, then, the contention on behalf of the appellees be correct, an English publisher might republish all of Thackeray's novels under the adopted title of some literature series, in consecutive numbers issued at least four times a year, and not only transmit them to subscribers through the mails of the United States, as second class mail matter, but also, it seems, secure their entry free of customs duty by the concluding provision of section 17. Again, whilst by section 10 the regular newspaper and periodical publications are made matter of the second class. Section 17 embraces "transient newspapers and periodicals" in the third class. Finally, in section 25 which gives free carriage within the home county to publications of the second class, the proviso relating to postage when delivery shall be made by carrier, uses the word, periodicals, alone.

The periodicals, or periodical publica ions above mentioned, may well be described as "originated and published for the dissemination of useful information, or devoted to literature, the sciences, arts, or some special industry." On the other hand, the several numbers of the Riverside Literature Series that have been named—each a complete independent work—are, as described in the publisher's catalogue, "master pieces of the greatest writers of England and America." They constitute literature, and are not acurately defined as "devoted to literature."

It is to be observed also, that the provisions of section 14 are not descriptive of the periodical publications named in section 10, but express limitations upon the admission of such publications to carriage as second class matter, under the head of conditions to which they must conform before the privilege can be enjoyed. One does not look to them to determine what is a periodical publication, but to ascertain whether, being such a publication as is embraced by section 10, it also answers the conditions imposed. Viewed in this light there is no substantial weight in the argument based on the

concluding words of the third condition that relates to binding, namely, "such as distinguished printed books for preservation from periodical publications." These words are to some extent confusing, but it would do violence to approved rules of construction to give them the effect of controlling the meaning of periodical publications, when the same shall have complied with other formal conditions. The words are apparently superfluous, and if used with any purpose it would rather seem to be to emphasize the limitation to unbound periodicals.

Another feature that distinguishes the Riverside Literature Series from the ordinary periodical is, that it has no "back numbers" that may become practically valueless, and dead matter, so to speak, in so far as the mailing privilege is concerned. No. 1, first issued in 1886, is as much alive as, and possibly more than the latest number of 1902, or 1903. It is Longfellow's Evangeline, and the catalogue of 1902, announces "a new and enlarged edition with introduction, notes and illustrations—the only authorized school edition"—and offers it in paper covers or bound in cloth.

After sixteen years, it continues to be mailed as matter of the second class to subscribers, when in paper covers bearing the number, and as matter of the third class to purchasers, when more substantially bound. Any inquiry into what may be meant by the condition requiring a legitimate list of subscribers, is precluded by the allegation of the bill to that effect which has not been denied.

Whether such requirement is answered by lists of dealers, who order from time to time exclusively for sale, and that embrace none of the single subscribers common with the ordinary periodicals, is, however, a question which the Postmaster General may be called upon to decide when admissions to the mail are demanded.

3. The fact that appellees may have made large contracts for the future delivery of their publications, at prices founded on confidence in the continuation of the certificate of admission to the mails at second class rates, that was issued under a former administration of the Post Office Department, does not entitle them to the injunction granted, under what we regard as an incorrect interpretation of the law. The courts ought to, and do give great weight to the long continued practice of an excutive department, founded on the interpretation of a statute conferring powers and duties of administration; but never a controlling weight save in cases of doubtful construction. In view of the importance of general stability, the succeeding heads of a department may well give greater weight than the courts to the decisions of their predecessors; but they have the right to reverse a practice, even long continued, when clearly convinced that it is founded on an incorrect interpretation of the law. Save in respect of a subject matter finally closed and settled under the former practice, the decision on which that practice is founded, contains no element of estoppel or *res judicata* as the doctrines thereof are applicable in judicial proceedings. Were an attempt made now to reopen the question as to mail matter

carried under the former permission, and collect additional postage, the question would be a very different one.

In conclusion it may be remarked that the certificate relied on is a mere license, and by its own express declaration continues until revoked.

In accordance with these conclusions, we must reverse the decree appealed from, with costs, and remand the cause to the court below with direction to dismiss the bill. It is so ordered.

Reversed.

FRIDAY, *June 5th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton.
No. 1303, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court with direction to dismiss the bill.

Per MR. JUSTICE SHEPARD.

June 5, 1903.

Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, Appellees.
No. 1303, April Term, 1903.

Now come Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, the appellees in the above entitled cause, and move and pray an appeal to the Supreme Court of the United States from the decree of this court in said cause rendered on the 5th day of June, A. D. 1903, and that said appeal be allowed and that the amount of bond be fixed to act as a supersedeas, and as a continuance of the injunction pending said appeal.

HOLMES CONRAD,
Solicitor for said Appellees.

Appeal allowed to the Supreme Court of the United States, as moved for and prayed, and amount of bond to act as a supersedeas, and a continuance of the injunction pending said appeal, fixed at the sum of four thousand dollars.

By the court:

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

(Endorsed:) No. 1303. Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, *et al.* Motion for appeal to Supreme Court U. S., order allowing same and fixing amount of bond to act as a supersedeas at $4,000. Court of Appeals, District of Columbia. Filed Jun- 15, 1903. Robert Willett, clerk.

(*Bond on Appeal.*)

Know all men by these presents, that we, Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, as principals, and American Surety Company of New York, a corporation organized under the laws of the State of New York, having an office and usual place of business in Boston, Mass., as surety, are held and firmly bound unto Henry C. Payne, Postmaster General in the full and just sum of ($4,000) four thousand dollars, to be paid to the said Henry C. Payne, Postmaster General, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Henry C. Payne, Postmaster General, and Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, No. 1303 April term, 1903, a decree was rendered against the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, and the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. Payne, Postmaster General, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay,

Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

NELLIE E. SWAIN, as to
HENRY O. HOUGHTON, *Trustee.* [SEAL.]
HENRY O. HOUGHTON. [SEAL.]
GEORGE H. MIFFLIN. [SEAL.]
JAS. MURRAY KAY. [SEAL.]
LUCY H. VALENTINE, [SEAL.]
Per G. H. M., *Att'y.*
O. R. HOUGHTON, [SEAL.]
A. F. HOUGHTON,
By G. H. M., *Att'y.* [SEAL.]

Sealed and delivered in presence of—
ALICE A. PEAR, as to { G. H. M. O. R. H. / J. M. K. / L. H. V. A. F. H.

AMERICAN SURETY COMPANY OF NEW YORK,
By WALLACE H. HAM,
Resident Vice President.

Attest:
[Seal of American Surety Company of New York.]
ELIPHALET F. PHILBRICK,
Resident Ass't Secretary.

Approved by—
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1309. Henry O. Houghton, trustee, *et al.*, appellants *vs.* Henry C. Payne, Postmaster General. Bond on appeal to Supreme Court U. S. Court of Appeals District of Columbia. Filed June 25, 1903 Robert Willett clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry C. Payne, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry O. Houghton, trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton are appellants and you are appellee, to show cause, if any there be, why the decree rendered

against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 25th day of June, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 25th day of June 1903.

HENRY H. GLASSIE,
Special Assistant to the Attorney General, Attorney for the Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-25 1903 Robert Willett clerk

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 42 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry C. Payne, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, No. 1303, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of July A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19023. District of Columbia Court of Appeals. Term No. 372. Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, *et al.*, appellants, *vs.* Henry C. Payne, Postmaster General. Filed July 28th, 1903.

TRANSCRIPT OF RECORD

(19,024)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 373.

BATES AND GUILD COMPANY, APPELLANT,

vs.

HENRY C. PAYNE, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES & GUILD COMPANY.
No. 1309.

a Supreme Court of the District of Columbia.

BATES & GUILD COMPANY, Petitioner,
vs.
HENRY C. PAYNE, Postmaster General, Respondent.
No. 23722. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill.*

Filed Jan. 27, 1903.

Supreme Court of the District of Columbia.

BATES & GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General.
In Equity. No. 23722.

To the honorable the supreme court of the District of Columbia, sitting in equity:

The Bates & Guild Company, a corporation duly established under the laws of the State of Maine and having a usual place of business in the city of Boston in the State of Massachusetts, brings this its bill of complaint against Henry C. Payne, Postmaster General of the United States.

And your orator complaining says:—

1. That your orator is a citizen of the United States;

That the respondent is a citizen of the United States holding the office of Postmaster General of the United States.

2. That prior to January, 1903, and at the time of filing this bill your orator was and is engaged in the business of a publisher of

books and periodicals in said Boston, having its office of publication at 42 Chauncy street in said Boston, and that said office of publication was and is well known.

3. That as such publisher it has been and is engaged in publishing a series of periodical publications known and described as "Masters in Music."

2 That the first of these publications was issued by it in January, 1903; that they are regularly issued at stated intervals as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from the known office of publication of your orator hereinbefore set forth;

That these publications, each and every of them, are formed of printed paper sheets, without boards, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications;

That these publications, each and every of them, are devoted to the art and science of music, and that the musical compositions appended thereto are in illustration and exposition of the literature of the art printed and published in connection therewith, as appears by the copy of the first issue of said publication which your orator files herewith;

And your orator alleges that it has a legitimate list of subscribers, that it has not been designed primarily for advertising purposes or for free circulation or for circulation at nominal rates, that it made due application for the entry and admission of this periodical as mailable matter of the second class, which application complied with all the rules and regulations required by law and was approved by the postmaster at said Boston; and that your orator in the publication and issue of these publications has complied with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class;

That on January twentieth, 1903, your orator received the following notice:—

3 "OFFICE OF THE POSTMASTER,
BOSTON, MASS., *January* 20, 1903.

Messrs. Bates & Guild, pub. 'Masters in Music,' 42 Chauncy St., Boston, Mass.

GENTLEMEN: In compliance with your request, I enclose a copy of the letter from the Third Assistant Postmaster General relating to the exclusion of your publication from the mails as second class mail matter.

Respectfully, GEO. A. HIBBARD, *Postmaster.*"

"(Copy.)

WASHINGTON, D. C., *January* 17, 1903.

"Postmaster, Boston, Mass.

SIR: You are informed that admission to the second class of mail matter of the publication known as 'Masters in Music,' published

in your city by Bates & Guild Company, is denied, for the reason that the publication has, under the statute, the characteristics of third class matter, and not second class matter. (Act of March 3, 1879.) It is composed mainly of sheet music.

"You will inform the publisher of the denial of entry.

"The deposit, or deposits, made under section 441 of the postal laws and regulations to cover mailings of this publication pending consideration of the application for its admission, should be converted into ordinary postage stamps, attached to a sheet or
4 sheets of paper, canceled and sent to this office as directed in the said section.

Respectfully,

(Signed) EDWIN C. MADDEN,

"*Third Assistant Postmaster General.*"

And your orator on information and belief declares that these publications will be excluded from the mails as mailable matter of the second class in accordance with the foregoing decision of the Postmaster General.

4. That the denial of entry to the second class of mail matter on account of their having been composed mainly of sheet music, as declared by the respondent was unlawful;

That the exclusion of these publications from the mail as mailable matter of the second class will cause your orator great pecuniary loss and damage both in the advanced rates demanded and in the necessary reorganization of its business in distributing these publications, all of which increase in rates and charges will have to be borne by your orator in those cases where existing contracts require it.

5. That your orator is liable, under existing contracts, to supply upwards of eighty thousand copies of these publications at a price based upon the postage rates chargeable upon them as mailable matter of the second class.

6. That the action of the Postmaster General in excluding these publications from the mails and denying to them the privilege of mailable matter of the second class as hereinbefore set forth, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office in regard to publications similar in character, and that your orator incurred the expense attending the preparation and publication of the excluded publications relying upon said practice;

5 That the right to have these publications carried in the mails as mailable matter of the second class is a valuable property right exceeding in value the sum of five thousand dollars.

Forasmuch as your orator is without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your orator prays:

First. That your orator may be declared to be entitled to have these publications entered, received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

Second. That it may please the court to grant an injunction restraining the respondent from enforcing the denial of entry set forth in paragraph 3 of this bill, and requiring him to receive said publications and transmit the same through the mail as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879.

Third. For such other and further relief as, under the facts stated, your orator may be entitled and in equity may seem meet.

Fourth. And your orator prays also for a preliminary injunction and that your honors will grant a writ of subpœna directed to said respondent, requiring him to answer this bill, but not under oath, the answer under oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

BATES & GUILD CO.,
By DAWES E. FURNESS, *President.*

WM. S. HILL, *Of Counsel.*

6 UNITED STATES OF AMERICA, }
State of Massachusetts. }

BOSTON, *January 22nd*, 1903.

On this twenty-second day of January, 1903, personally appeared Dawes E. Furness, who being by me duly sworn deposes and says that he is the president of The Bates & Guild Company, the complainant within named; that he has read the foregoing bill of complaint subscribed by him, and knows the contents thereof and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

Sworn to and subscribed before me this twenty-second day of January, 1903.

[NOTARIAL SEAL.] JOHN ABBOTT,
Notary Public.

HOLMES CONRAD,
Sol. for Compl'ts.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE SECRETARY,
BOSTON, *Jan'y* 22, 1903.

I hereby certify, that at the date of the attestation hereto annexed John Abbott was a notary public for the said Commonwealth, duly commissioned and constituted, that as such notary public, he was by law authorized to administer oaths and take acknowledgments of deeds and other instruments throughout the Commonwealth; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; and that I believe the signature to the annexed attestation to be genuine.

In testimony whereof, I have hereunto affixed the seal of the Commonwealth the date first above written.

[SEAL.] WM. M. OLIN,
Secretary of the Commonwealth.

7 *Rule to Show Cause.*

Filed Jan. 27, 1903.

In the Supreme Court of the District of Columbia.

THE BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General of the United States. } No. 23722. Equity.

On consideration of the bill of complaint this day filed it is this 27th day of January, 1903, by this court adjudged and ordered, that the defendant shall show cause in this court on the 24th day of February, 1903, why the prayer of the said bill should not be granted.

A. B. HAGNER,
Asso. Justice.

Marshal's Return.

Executed the within rule by serving a copy thereof on the defendant Henry C. Payne, personally Feb. 12, 1903.
AULICK PALMER, *Marshal.*
S.

8 *Answer.*

Filed Feb. 25, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

Answer of the defendant, The Postmaster General, to the bill of complaint of the above-named complainant, and to the rule to show cause why injunction should not be granted thereon.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering says:

I.

The defendant admits the allegations of the first paragraph.

II.

The defendant admits the allegations of the second paragraph.

III.

For answer to the third paragraph the defendant, upon information and belief, admits that the complainant as a publisher has been and is engaged in publishing a series of publications known and described as "Masters in Music;" but the defendant denies that the said publications are a "periodical publication" within the meaning of the act of March 3, 1879, establishing the second class of mailable matter.

The defendant admits that the first of said publications was issued by the complainant in January, 1903, and avers that such publication of January, 1903, is the only publication of the series known and described as "Masters in Music" of which this defendant has any knowledge or cognizance whatever. Inasmuch as but one
9 publication known to the defendant has been published under the name of "Masters in Music" the defendant is unable to admit that the said publications are published as frequently as four times a year, or bear a date of issue, or are numbered consecutively, or are issued from the known office of publication of the complainant, or that said publications or each and every of them are formed of printed paper sheets without boards, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications; or that said publications or each and every of them are devoted to the art and science of music.

But this defendant says that on or about January 5, 1903, the complainant, The Bates and Guild Company, by Winthrop Ames, treasurer, did, at the post office at Boston, Massachusetts, make an application to have the publication "Masters in Music" designated as a magazine published at said Boston admitted to the mails at the second-class rates of postage. That in and by its said application the complainant stated that the said publication was devoted to "the arts: being devoted to the history, appreciation, execution, and news concerning music of a public character," that said publication was intended to be a monthly, that its known office of publication was 42 Chauncey street, Boston, Massachusetts, that the first issue was to appear on January 1, 1903, that the complainant, the publisher, was the only person interested financially in said publication, that the editor of said publication was Daniel Gregory Mason, instructor in music in Princeton university, that the said publication had 2045 legitimate subscribers, of whom 1059 were at the full advertised subscription price direct to the publisher solely for the value of the publication and without any other inducement, premium, gift, chance to win a prize or other consideration whatsoever, and that the subscription price of said publication was $2.00 per year.

The defendant further avers that in due course of adminis-
10 tration the said application came to the Third Assistant Postmaster General, who, in the distribution of powers and

duties in the Post Office Department is charged with the duty to decide whether or not a publication is entitled to transmission in the mails at the second-class rates of postage and to determine accordingly for and on behalf of the Postmaster General; that such application together with a copy of the publication itself, was duly examined and considered by said Third Assistant Postmaster General; that as a result of such examination and consideration the said Third Assistant Postmaster General, acting for the Postmaster General in that behalf, became and was and still is of the opinion and judgment that the said publication had not and has not the characteristics of second class mail matter under the provisions of the act of March 3, 1879, but on the contrary had and has the characteristics of third-class matter under said statute, and the said Third Assistant Postmaster General held and determined accordingly that the same was not entitled to transmission at the second-class rates of postage.

The defendant further says that in accordance with such determination the said Third Assistant Postmaster General, acting for this defendant in that behalf, on or about January 17, 1903, notified the postmaster at Boston, Massachusetts, as follows:

"You are informed that admission to the second class of mail matter of the publication known as 'Masters in Music,' published in your city by Bates and Guild Company, is denied, for the reason that the publication has, under the statute, the characteristics of third class matter, and not second class matter. (Act of March 3, 1879.) *It is composed mainly of sheet music.*

You will inform the publisher of the denial of entry.

The deposit, or deposits, made under section 441 of the Postal Laws and Regulations, to cover mailings of this publication pending consideration of the application for its admission, should be converted into ordinary postage stamps, attached to a sheet or sheets of paper, canceled and sent to this office as directed in the said section."

Thereupon the postmaster at Boston, on January 20, 1903, sent the complainant the notice set forth in the third paragraph of complainant's bill.

11 And this defendant denies that said publications will be excluded from the mails as mailable matter of the second class and says that on the contrary said publications have never been admitted to the mails as mailable matter of the second class, but that the application for such admission was, upon due consideration as aforesaid, rejected, and the said publications refused admission to the second class of mailable matter.

The defendant further says that the said publications, as evidenced by the copy thereof submitted to the Third Assistant Postmaster General with the application for admission, as well as evidenced by the copy annexed as an exhibit to the bill of complaint herein, is not a "newspaper or other periodical publication" within the intent and meaning of section 10 of the act of March 3, 1879, chapter 180. Defendant further says that the said publication falls

within the third class into which mailable matter is divided by section 7 of the said act, namely: "Third. Miscellaneous printed matter," and that it has the characteristics of such mail matter of the third class as designated by section 17 of the said act, namely: "Books, transient newspapers and periodicals, circulars and other matter wholly in print (not included in section 12) proof sheets, corrected proof sheets and manuscript copy accompanying the same."

The defendant further says that the said publication has the characteristics of third-class mail matter aforesaid in that it is a book, to wit: a collection of sheet music by a single composer prefaced by notes and criticisms upon the work of such composer; that in respect of the matter purporting to be literary contained in said publication, it is, in substance and effect, a series of notes illustrative of the music aforesaid, or a monograph upon the life and work of said composer; that such matter therein contained has not the characteristics of currency or miscellany common to "newspapers and other periodical publications;" that it relates to a single subject
12 and to a single individual, and that it is introductory and prefatory to the main and substantial contents of said publication, namely: sheet music. The defendant further says that such matter purporting to be literary is not matter of the second class such as is contained in "newspapers and other periodical publications," but is matter of the third class such as is contained in "books" or "transient periodicals" and is not distinguishable therefrom. With respect to the main contents of the said book, namely: sheet music, the defendant says that sheet music is matter of the third class, being "other matter wholly in print" within the intent and meaning of section 17 of the act of March 3, 1879.

The defendant says that so far from being a "periodical publication" of the second class, the publication published under the title "Masters in Music" is a series of distinct monthly monographs; that each monthly publication has for its subject a distinct composer of music; that each publication is complete in itself and is a reprint of a collection of sheet music by the particular composer with which such publication is concerned; that such publications have no true relation or connection one with another, but that they are designed to follow one another monthly in such manner as to form a wholly disconnected and varied succession of distinct collections of sheet music, prefaced by explanatory, biographical, critical, and bibliographical comment; that the only connection between the successive publications consists in the fact that over the name of the particular composer with which such publication is concerned are printed the words "Masters in Music. A Monthly Magazine," and that such publications are numbered successively. That in confirmation of the foregoing statement the defendant refers to the January number of said publication, the whole of which is concerned with the composer Mozart, and upon the cover of which over the name "Mozart" appear the words "Masters in Music. A Monthly Magazine," and to the fact that in said copy of
13 January there appears an announcement as follows:

"*Masters in Music.*

The second, February, issue of Masters in Music will have for its subject

CHOPIN.

Contents.

A portrait of Chopin: From the medallion by Bovy.
A life of Chopin: Based upon the most authentic accounts.
The art of Chopin: Brief extracts giving a summary of what the most eminent critics consider the essentials of his genius.

Musical Selections.

I.	Nocturne in F-minor	Opus 55, No. 1
II.	Prelude in D-flat	No. 15
III.	Etude in G-flat	'The Butterfly'
IV.	Scherzo and largo from the sonata in B-minor	Opus 58
V.	Waltz in D-flat	Opus 64, No. 1
VI.	Two mazurkas	Opus 17, Nos. 1 and 3
VII.	Polonaise in A-major	'The Military Polonaise'

Editorial notes will accompany the above selections, suggesting the interpretations.

Price, twenty cents.

Bates & Guild Co., 42 Chauncy street, Boston."

Defendant further denies that the term "magazine" upon the cover of said publication is a true designation of its contents, and avers that the said publication is not a magazine in any sense of the word, but is a book, or part of a book, in support of which statement defendant respectfully refers to a copy filed with the bill as an exhibit, by an inspection whereof it will appear that no designation of the publication as a magazine, no date of issue, and no serial number appear therein from the first page to the last page of the same, but stripped of its cover no mark or sign or designation of such publication as a periodical appears thereon.

14 And the defendant respectfully craves leave to refer, as a part of this answer, to the copy of said publication annexed as an exhibit to the bill herein, and submits that the true character and nature of the said publication will appear by an inspection thereof to be that of mail matter of the third class.

The defendant further says that although each of said publications relates to the subject of music, namely: a certain composer thereof of sufficient distinction to be designated a master or classic, it nevertheless is not devoted to "the arts" within the intent and meaning of the act of March 3, 1879, for the reason that it is not a continuing, permanent "periodical publication" within the accepted and statutory meaning of that term, the contents of which are devoted to the arts and have the characteristics of miscellany and currency such

as denote periodical publications and magazines in general, but that, save in the sense that the subject matter of such publication is the art of music, wherein it differs in no sense or particular from any other collection of sheet music or of any other book relating to music, the said publication does not comply with the statutory requirements of sections 10 and 14 of the act of March 3, 1879.

And the defendant is further informed and believes, and so believing avers, that said publications and the series of the same are not designed as a magazine devoted to the subject of music, but as a series of separate and independent works, each upon a different composer, largely for the purpose of affording a series of texts for instruction in and the study of music, and that each of said texts, in respect both of the sheet music therein contained and of the biographical, critical and bibliographical comment is complete in itself; and the defendant further says that the publications published under the title "Masters in Music" are not a "periodical publication" but a series or library of publications.

15 IV.

For answer to paragraph four, the defendant respectfully refers to the preceding answer to paragraph three. He is not informed and can neither admit nor deny that the refusal to transmit said publications as mailable matter of the second class will cause the complainant great pecuniary loss and damage, but so far as this defendant is informed such refusal would result merely in the payment by complainant of the third-class rate of postage upon such publications if the complainant transmits the same through the mails of the United States.

V.

The defendant can neither admit nor deny the allegations of the fifth paragraph, but submits that if the complainant is under existing contracts to supply 80,000 copies of these publications, it is under contracts to supply the same to persons other than the designated subscribers thereof.

VI.

The defendant denies that the action of the Postmaster General in refusing to admit these publications to the second class of mailable matter is a reversal of, or contrary to, the practice sanctioned by him and his predecessors in office in regard to publications similar in character; but the defendant further submits that the admission and transmission of mailable matter under the terms prescribed by the statutes is a continuous administrative act, the performance of which is devolved by law upon this defendant as Postmaster General for the time being, and in the performance of this duty he is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Postmaster General of mailable matter of a certain description at the second class or any other particular rates constitute any obligation whatever upon the United

States or its officers thereafter to admit publications similar in character to the same rate.

16 The defendant denies that the complainant has any right to have said publications transported in the mails as mailable matter of the second class, but he is unable to admit or deny that if said supposed right exists it exceeds in value the sum of five thousand dollars.

Answering generally to the whole bill, the defendant says, that, as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service. That among his duties is that of classifying the mail matter offered for transmission through the United States mail and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him to investigate and ascertain whether matter offered for transmission as second-class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second-class rates; that such investigation, exercised by this defendant as the head of an executive department in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and an interpretation of law; and that in the case of the publication hereinbefore mentioned, after an inquiry into the facts relevant and material to the inquiry, an examination of evidence and a construction of the law and application thereof to the facts, the defendant found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class matter, but on the contrary the characteristics of third-class matter, and not fulfilling the conditions established by law for second-class matter, were not entitled to admission to the mails at the second-class rate, and the application for that rate of postage was therefore denied; which said finding,

17 determination and decision involved the exercise of judgment and discretion on the part of this defendant, and the Third Assistant Postmaster General acting in that behalf, and for that reason, as defendant respectfully submits, is not subject to be reviewed by this honorable court.

Defendant is further advised, and so believing avers, that the privilege of having publications, which comply with the conditions of second-class matter as defined in the act of March 3, 1879, transmitted at the second-class rate is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainant in and by its said bill and the matters and things set forth therein does not make or state such a cause as would entitle the complainant to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his de-

cision that the said publications are not entitled to transmission at second-class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion, or to require the Postmaster General, as an executive officer, to perform a supposed duty in the admission of mailable matter by an injunction forbidding him to refuse to perform said duty, in which respect the defendant respectfully submits that the complainant has a plain, adequate and complete remedy at law by a writ of mandamus.

And defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof. And having fully answered, the defendant
18 prays to be hence dismissed with his reasonable costs.

H. C. PAYNE,
Postmaster General.

ASHLEY M. GOULD,
HENRY H. GLASSIE,
Solicitors for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

Henry C. Payne, Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

H. C. PAYNE,
Postmaster General.

Subscribed and sworn to before me this twenty-fourth day of February, A. D. 1903.

[Seal of Thomas E. Roach, Notary Public, District of Columbia.]

THOS. E. ROACH,
Notary Public.

19 *Replication.*

Filed Mar. 10, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

The complainant joins issue upon the answer of the defendant, and will submit the cause on bill and answer.

HOLMES CONRAD,
Sol. for Complainant.

Decree.

Filed Mar. 10, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD COMPANY
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23722.

This cause coming on to be heard on the bill and the exhibits filed therewith on the answer of the defendant and on the papers filed in the cause, and on the proceedings had therein, was argued by counsel. In consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed.

(1) That the complainant, The Bates and Guild Company, is entitled to have its publication, entitled "Masters in Music" entered, received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

(2) That the defendant The Postmaster General, be and he hereby is perpetually restrained from denying to the complainant the receipt, entry and transmission through the mails, of its publication entitled "Masters in Music" as mailable matter of the second class, as defined by the act of Congress, approved March 3, 1879 and also from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class, as defined aforesaid.

(3) That the complainant do recover of the defendant his costs incurred in this suit, and may have execution therefor as at law.

A. B. HAGNER,
Asso. Justice.

And the defendant in open court by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals which is hereby allowed.

A. B. HAGNER.

21 *Stipulation.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES AND GUILD CO.
vs.
PAYNE, Postmaster-General. } Eq. No. 23722.

It is stipulated by and between counsel for the respective parties that the exhibits filed with the bill in this cause may be certified by the court to the Court of Appeals with the transcript of the

record in lieu of a copy thereof and that in the Court of Appeals, the printing of such exhibit shall be dispensed with and the same used at the hearing and inspected and examined by the Court of Appeals as a part of the record on appeal.

HOLMES CONRAD,
Solicitor for Complainants.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for Defendant.

22 *Directions to Clerk for Preparation of Transcript.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES & GUILD CO. *vs.* PAYNE, Postmaster-General. } Eq. No. 23722.

The clerk of the court in making up the record on appeal in this cause will include: (1) bill of complaint and rule to show cause; (2) answer of the defendants; (3) replication; (4) decree; (5) opinion and (6) stipulation as to printing exhibits.

MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendant.

HOLMES CONRAD.

23 *Opinion of Justice Hagner.*

Filed Mar. 20, 1903.

In the Supreme Court of the District of Columbia.

BATES & GUILD COMPANY *vs.* HENRY C. PAYNE, Postmaster-General. } No. 23722. In Equity.

Opinion by Mr. Justice Hagner.

The bill in this case was filed the 27th of January, 1903. It alleges that the complainant company were publishers of books and periodicals in Boston prior to January, 1903, and as such are engaged in issuing a series of periodical publications described as "Masters in Music;" the first of which was issued in January. And the bill proceeds to allege compliance by the complainants with the various formal requirements of the act of 1879 authorizing the issue to the company of a certificate of entry admitting its publications to the rates of second class postage.

That after issuing said first number, the company applied for such certificate to the postmaster at Boston, who approved of the application: but on the 20th day of January, 1903, complainants received from said postmaster a copy of a letter from the Third Assistant Postmaster-General informing them that admission of the publication in question to the second class of mail matter was denied for the reason that the publication has, under the statute, the characteristics of third class mail matter, and not of second class matter—that it is composed mainly of sheet music.

They charge that the exclusion of their said publication as second class matter will entail great pecuniary loss upon them, as they are liable to furnish 80,000 copies of the publication at a
24 price based upon the postage rates of second class matter. They charge that such refusal is a reversal of, and contrary to the practice sanctioned by defendant and his predecessors, and that the company would sustain great pecuniary loss if their publications are thus excluded from the second class of mail matter. Wherefore they pray they may be declared entitled to have their said publications so admitted to the mails as mailable matter of the second class; and that an injunction may be granted restraining the Postmaster-General from enforcing his denial of entry, and requiring him to transmit the said publications as mailable matter of the second class, and for further relief.

The answer of the Postmaster-General, after various formal admissions of fact, declares he is unable to determine whether complainant's publication fulfils the various requirements of the act of Congress applicable to second class matter, which he proceeds specifically to recite, inasmuch as only one number of the publication has yet been issued.

He admits that about January 5, 1903, complainant company, by one of its officers, applied to the Boston post office to have said publication admitted to second class rates, and recites the various statements contained in the application, alleging the compliance of the company with the various prerequisite requirements of the statute; that the Third Assistant Postmaster-General, who was charged with the duty to decide whether publications are entitled to transmission at second class rates made such examination and became, and still is, of the opinion and judgment that the publication so offered was not so entitled for the reasons stated in the bill and in the letter therein set forth.

Further answering he says the said publication is not a newspaper or other periodical publication, but falls within the third class of mailable matter, inasmuch as it is a book, being a collection of sheet music by a single composer, prefaced by notes and criticisms, as he proceeds to explain at length; and that no date of issue or
25 serial number appears upon it anywhere. Denying his present decision is a reversal of the present practice of himself and his predecessors, he insists his action with respect to the subject in hand is a continuous administrative act, involving the exercise of judgment and discretion, and, therefore, as Postmaster-General, he

is not bound by the action of his predecessors, and his present action is not subject to be reviewed by this court.

So far as the pleadings in this case present the question of the jurisdiction of this court to examine into the legality and the correctness of the decision of the Postmaster-General as to the proper construction of the statute of 1879; and as to the further question, whether his decision and determination that the publication referred to in the pleadings is not entitled to entry as second class mail matter, I conceive my decision in the case of Houghton, *et al.*, against The Postmaster-General, No. 23,342, equity, just delivered, is conclusive upon me in this. Of course, the facts are naturally different in the cases, but the principle upon which I discussed the facts in the first case leads me to precisely the same conclusion in the present. There are two questions presented in the present proceedings which were not raised in the former.

The first is, that as only one number of the "Masters in Music" had been issued when the application of the complainant company was made and refused, no certificate can now be issued as it is impossible to say whether at least three more numbers would be issued within the year. If this contention were to be sustained, it would be impossible ever to start such a publication as second class matter, for the four numbers could not be admitted to that class without a previous order allowing it, and as no such order could be passed until the four numbers had been issued; thus nothing ever could be done by way of inaugurating it, a new enterprise of this character.

More reliance seemed to be placed on the contention that the complainant had mistaken its remedy, and should have applied to a court of law for a writ of mandamus. That the writ of in-
26 junction in equity and of mandamus at law are somewhat correlative is conceded. The difference between the circumstances of cases justifying the appeal to the one form of remedy rather than the other, are well stated in 92 U. S., 531, *Board of Liquidation vs. McComb.*

That case came before the Supreme Court on an appeal from a decree in equity of the circuit court of the United States for the district of Louisiana, granting an injunction at the suit of a bondholder against the board of liquidation of that State. The Supreme Court first examined the facts of the case, and decided the complainant was entitled to relief of the nature claimed. As he had invoked and obtained a decree for an injunction, naturally the losing party insisted the remedy should have been sought by a mandamus, and supported its contention by the usual arguments. Mr. Justice Bradley, approaching that branch of the case, disposed of the objection as follows:

"But is has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which ade-

quate compensation can not be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

It is true the distinctions pointed out in the opinion of Mr. Justice Bradley have not always been observed by counsel, nor, apparently by some of the courts, though it may be that careless reports have failed to point out the differentiating facts. Justice Bradley's language is almost reproduced by Justice Peckham in the School of Magnetic Healing case, 157 U. S., 110, to which I referred in the previous case, which was an application for an injunction. The court there said:

"In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster-General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster-General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only
27 remedy at all adequate to the full relief to which the complainants are entitled."

As counsel for the defendant cited a Maryland case upon this point, I will refer to another. Legg and others *vs.* The Mayor, etc. of Annapolis, 42 Md. 225. The legislature of Maryland in 1874, passed an act authorizing the governor to appoint three police commissioners to whom was to be committed the power practically to supersede the corporate government and control the city. The corporate authorities, insisting the act was not legally passed, its adoption having been procured by fraud, attempted to frustrate the scheme, by suing out a mandamus to compel the so-called commissioners to abstain from interfering with the city government in any way. The circuit court ordered the writ. In the court of appeals the other contentions of the corporation were practically sustained, but it was further objected the proper remedy was not by mandamus at law, but by injunction in equity. On pages 225–6 Judge Alvey in discussing this point, used the following language, which I shall cite at length, as it may aid in removing the confusion into which counsel sometimes fall in considering the points of distinction between these "somewhat correlative remedies":

"3. The next and last question is, whether the petition of the appellees presented a case proper for the issue of a mandamus; and this question is important to be decided, as upon its decision depends whether the case shall be remanded, or be dismissed, without further proceeding.

According to the allegations of the petition in this case, the appellees are in office exercising all the duties and functions thereof, and the appellants, though appointed to the new office created by the statute of 1874, chapter 421, have not entered upon the duties of that office, and have in no manner interfered with the appellees in

the exercise of the office they hold. The appellants are not charged with withholding anything that pertains to the office of the appellees, nor even with exercising powers and privileges that are in conflict with those exercised by the latter. It is alleged that the appellants have been appointed by the governor under the act of 1874, as police commissioners, and that, as the appellees are informed, they have accepted the appointment, or intend to accept the same, 'and undoubtedly propose and design, unless restrained from so doing, to exercise all and singular the powers pretended to be conferred on them as a board of police commissioners, by said pretended law." The petition then proceeds to *to* pray that a writ of mandamus may issue to the appellants, 'commanding them, and each of them, to surcease and desist from exercising, or assuming to exercise, in any manner, any power or authority or jurisdiction under the said pretended act, by the appointment of any police or otherwise; and further commanding them, and each of them, to abstain from interfering, or attempting to interfere, with the police depart-
28 ment established by your petitioners, under their said charter and ordinances, and from hindering, obstructing, resisting or opposing, the executive officers of said city, in the exercise of their lawful powers, and in the discharge of their official duties.'

This is the usual prayer for an injunction, in a bill in equity, to restrain an unlawful interference with rights; but we are not aware of any precedent for the use of the writ of mandamus to accomplish such a purpose. *Mandamus* is a writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured. *Reg. vs. Bishop of Chichester, 2 Ell. & Ell.*, 209. But as simply a preventive remedy it has never been used, so far as we have been able to discover. The nature of the writ, and the end for which it was framed, direct upon what occasion it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Its use is therefore confined to those occasions where *the* law and good government there ought to be one. *6 Bac. Abr., Tit. Mand.*, 418. But there can be no want of remedy for any illegal or improper interference with the exercise of the powers and duties legally pertaining to the office of the appellees."

"In the case of Ray *v.* Peach, 2 Salk, 572; a dissenting minister being qualified to preach under the toleration act, and being illegally convicted for the exercise of his right, and supposing he would be further prevented from exercising his right to preach, except at his peril of abiding a conviction therefor, applied for a mandamus to be permitted to preach, but the writ was denied and the court held, "That a mandamus is always to do some act in execution of law; whereas the writ, if issued in that case, could be in the nature of a *writ de non molestando*. And in accordance with this Ch. Baron Comyns, in his Dig. Tit. Mand. (*b*) lays it down as settled that a mandamus does not lie to prevent a molestation against the law. Tapp. on Mand., 189, 190.

"Taking this to be an established principle upon the subject, there is no proper case stated in the petition of the appellees to justify the issuing of the writ. The application was founded entirely upon an apprehension that the appellees might be disturbed or molested in the exercise of some of the functions and powers that have heretofore belonged and may still pertain to their office. To grant the writ in such case, would be simply making it a substitute for an injunction.

"We think the petition ought to be dismissed, and we shall
29 therefore reverse the order appealed from, and dismiss the petition with costs to the appellants."

Objection is also made to the application because it asks for a mandatory injunction to require the Postmaster-General to transmit the publication as second class mailable matter. A prayer for an unauthorized form of relief in connection with others which are appropriate, is not necessarily fatal to the application, since the court may grant such relief as is proper although it may refuse the untenable prayer. It may be well, however, to consider whether there is ground for the contention that it would be improper to order an injunction in a mandatory, as well as in the usual form. The familiar law as laid down in the text-books, is thus stated by High on Injunctions, vol. 1, sec. 2:

"Injunctions are known as mandatory or preventive, according as they command defendant to do or to refrain from doing a particular thing. While the jurisdiction of equity by way of mandatory injunction is rarely exercised, and while its existence has even been questioned, it is nevertheless too firmly established to admit of doubt. Mandatory injunctions are seldom allowed before a final hearing, though they may be granted on interlocutory applications. And while a court of equity is always reluctant to grant a mandatory injunction upon an interlocutory application and before final hearing, it may yet do so in an extreme case when the right is clearly established and the invasion of the right results in serious injury. And when there is a wilful and unlawful invasion of plaintiff's right, against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may be granted in the first instance. It is to be observed, however, that courts of equity rarely interfere to command the doing of a positive act, but the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do. Even then the jurisdiction is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages. And in determining whether to grant relief by way of mandatory injunction courts of equity will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding the relief, and will be governed accordingly."

SEC. 358. Where proceedings have been instituted in a court of equity to establish the title to real estate, and a decree has been ren-

dered that defendant make a conveyance vesting the legal title in complainant, neglect to execute such decree will warrant a mandatory injunction to deliver possession. In such case equity proceeds upon the principle that its decree, not having been complied with, operates as a conveyance, and the right being sufficiently established an injunction is a proper remedy for its enforcement; otherwise complainant might be compelled to resort to proceedings in ejectment to obtain the possession to which he is already entitled by the decree, and thus be greatly delayed and embarrassed.

Id. § 358.

"An injunction is the appropriate remedy to protect a railway company in laying its track over lands which have been properly condemned, by restraining mill owners from keeping the water in their mill dam at such an unusual height as to flood complainant's track and to prevent its operations. And such an injunction, commanding the mill owners to refrain from raising the water beyond a specified height, is not regarded as a mandatory injunction."

Id. § 646.

* * * "And where the lessee of a mine had worked into complainant's premises and extracted a large quantity of ore therefrom, a mandatory injunction was granted requiring defendant to permit complainant to inspect the mine for the purpose of determining the extent of the injury."

Id. § 737.

* * * "So where party-walls are required by law to be of solid brick or stone, without openings, the erection by a lot owner of a party-wall containing windows constitutes such a nuisance as comes within the restraining powers of equity, and it will be enjoined. And in a case of nuisance to a dwelling-house, the injunction will be made mandatory if the circumstances of the case require it."

See also Nailor *v.* Corcoran, 6 Mackey, 580.

"One who has purchased personal property at a sale under execution, which is afterward proved to belong to a person other than the judgment debtor, who recovers it by due course of law, is not entitled to an injunction to restrain proceedings upon his bond given for the purchase money."

Id. § 80.

"In cases where relief by injunction is sought to prevent a deprivation of ancient rights, the question for determination is usually as to the degree of deprivation. And where a substantial injury is shown to result from the proposed erection and the darkening of plaintiff's lights, a court of equity may properly interfere. The test to be applied is, whether plaintiff's house is, by the obstruction which he seeks to enjoin, rendered in a substantial degree less fit for

purposes of occupation than before. In other words, the dim-
31 inution of light must be a substantial diminution, or one which renders plaintiff's house substantially less comfortable. This being shown, equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun. And in the case of obstruction to ancient lights a mandatory injunction has been allowed, even before the hearing. But where it is shown that the obstruction which it is sought to enjoin is such as to interfere with the ordinary occupations of life, an injunction will be withheld, the real question to be determined being whether the light is so obstructed as to cause material inconvenience to the occupants of life. And when plaintiffs fails to show any substantial damage as likely to result to themselves, the relief will be withheld.

Id. § 860.

Id. 2 High, §§ 1150, 1158 and 1331.

Upon a full consideration of the authorities and, upon the justice of the cases, I see no reason why the injunction should not issue in a mandatory form and I shall so order.

A. B. HAGNER,
Asso. Justice.

32 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 31, inclusive, and the exhibit marked "Exhibit to Bill" transmitted herewith, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No 23,722, equity, wherein Bates & Guild Company is petitioner, and Henry C. Payne, Postmaster General, is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24 day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1309. Henry C. Payne, Postmaster General, appellant, *vs.* Bates & Guild Company. Court of Appeals, District of Columbia. Filed Apr. 25, 1903. Robert Willett, clerk

TUESDAY, *May 19th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, } No. 1303

and

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309

The argument in the above entitled causes was commenced by Mr. H. H Glassie attorney for the appellant, and was continued by Messrs. Wm. S. Hall and Holmes Conrad attorneys for the appellees and was concluded by Mr. John G. Johnson attorney for the appellant.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY. } No. 1309.

(Mr. Justice SHEPARD delivered the opinion of the court.)

The bill for injunction in this case is similar in respect of formal allegations to that in No. 1303, Payne *vs.* Houghton and others, with which it was argued and submitted by the same counsel.

The publication is entitled Masters in Music—a monthly magazine—and was begun in January 1903.

The first number filed as an exhibit with the bill, bears the imprint, Mozart. It contains a brief biographical sketch of the distinguished musician, some critical notes, and then thirty-two pages of sheet music selected from the compositions of the master.

Immediately after the publication of this first number, its admission to the mails as second class matter was demanded on the ground that it was a periodical publication within the meaning of the tenth section of the postal law, and complied with the conditions prescribed in the fourteenth section.

Permission was refused by the Postmaster General and the bill was filed January 27, 1903, for an injunction to restrain him from excluding the said publication from entry and transportation in the mails at second class rates.

As but one number of the Masters in Music had made it- appearance when the bill was filed, it is unnecessary to consider whether the contemplated series is subject to the objections raised against the Riverside Literature Series, in Payne *vs.* Houghton (recently decided) or may properly fall within the class of periodicals to which, as was held in that case, the second class mailing privilege is limited

When application was made to the Postmaster General, the question was one that unquestionably demanded the exercise of discretion in deciding it. As but one number had been issued, and that, stripped of its cover with the designation of "Magazine," would have all the appearance of an unbound book, the facts relating to the contents of future numbers could only be obtained from the representations made by the publishers.

Whilst he may undoubtedly accept these representations in the case of a new publication, when satisfied with the conformity of the first number, he is not bound to do so. If not satisfied he could insist upon a literal compliance with all of the conditions of section fourteen, before taking final action.

The facts of this particular case illustrate the danger of granting relief by way of mandatory injunction, as has been done in this case. By the terms of the final decree the complainant is declared "entitled to have its publication entered, received and transmitted through the mails as matter of the second class," and the Postmaster General is perpetually restrained from denying to the complainant the receipt, entry and transmission through the mails, of its publication entitled Masters in Music, as mailable matter of the second class * * *; and also from refusing to receive said publication and transmit the same," etc. No matter then what may be the particular contents of future numbers of the Masters of (in) Music, the Postmaster General is bound to receive and transport them as second class mail matter, as long as they retain a paper cover and bear the title of the first number issued.

We are of the opinion that the decision required of the Postmaster General in the application of the complainant was not a mere formal or ministerial act.

As was said in the recent case of U. S. *ex rel. v.* Hitchcock (U. S. Supreme Court May 18, 1903): "Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction. If this writ were granted we would require the Secretary to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

The decree will be reversed with costs and the cause remanded with direction to dismiss the bill. It is so ordered.

Reversed.

FRIDAY, *June 5th, A. D.* 1903.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY.
} No. 1309, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court with directions to dismiss the bill.

Per MR. JUSTICE SHEPARD.

June 5, 1903.

Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
BATES AND GUILD COMPANY, Appellee.
} No. 1309, April Term, 1903.

Now comes Bates and Guild Company, the appellee in the above entitled cause, and moves and prays an appeal to the Supreme Court of the United States from the decree of this court in said cause rendered on the 5th day of June, A. D. 1903, and that said appeal be allowed and that the amount of bond be fixed to act as a supersedeas, and as a continuance of the injunction pending said appeal.

HOLMES CONRAD,
Solicitor for Appellee.

Appeal allowed to the Supreme Court of the United States, as moved for and prayed, and amount of bond to act as a supersedeas, and as a continuance of the injunction pending said appeal fixed at the sum of one thousand dollars.

By the court:

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

(Endorsed:) No. 1309. Henry C. Payne, Postmaster General, *vs.* Bates and Guild Co. Motion for appeal to Supreme Court U. S., order allowing same & fixing amount of bond to act as a supersedeas at $1,000. Court of Appeals, District of Columbia. Filed Jun- 15, 1903. Robert Willett, clerk.

(*Bond on Appeal.*)

Know all men by these presents, that we, Bates and Guild Company, as principal, and American Surety Company of New York a corporation existing under the laws of the State of New York, having an office and usual place of business in Boston Massachusetts, as surety, are held and firmly bound unto Henry C. Payne, Postmaster General in the full and just sum of ($1000) one thousand dollars, to be paid to the said Henry C. Payne, Postmaster General, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Henry C. Payne, Postmaster General, and Bates and Guild Company, No. 1309, April term, 1903 a decree was rendered against the said Bates and Guild Company and the said Bates and Guild Company having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. Payne, Postmaster General citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Bates and Guild Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal Bates & Guild Co.]

BATES & GUILD CO. [SEAL.]
DAWES E. FURNESS, *Pr.*

[Seal of American Surety Co. of N. Y.]

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By WALLACE H. HAM, *Resident Vice President.*
Attest: ELIPHALET F. PHILBRICK, [SEAL.]
Resident Ass't Secretary.

Sealed and delivered in presence of—

—— ——.

Approved by—
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1309. Henry C. Payne, Postmaster General, appellant, *vs.* Bates and Guild Company. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 25, 1903. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry C. Payne, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Bates and Guild Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 25th day of June, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 25th day of June, 1903.

HENRY H. GLASSIE,
Special Assistant to the Attorney General, Attorney for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-25, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 29 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry C. Payne, Postmaster General, appellant, *vs.* Bates and Guild Company, No. 1309, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of July, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19024. District of Columbia Court of Appeals. Term No. 373. Bates & Guild Company, appellant, *vs.* Henry C. Payne, Postmaster General. Filed July 28th, 1903.